IN THE MATTER OF ARBITRATION BETWEEN

INDEPENDENT SCHOOL DISTRICT NO. 282 ST. ANTHONY - NEW BRIGHTON, MN.

Employer,

and

ARBITRATION DECISION AND AWARD
BMS CASE NO. 12 PA 0137
(Discharge)

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 284

Union.

Arbitrator:	Andrea Mitau Kircher
Date and Place of Hearing:	January 6, February 13, and April 11, 2012 St. Anthony Village, Minnesota
Date Record Closed:	May 11, 2012
Date of Award:	June 7, 2012

APPEARANCES

For the Union:

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For the Employer:

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INTRODUCTION

SEIU Local 284 ("Union") and ISD No. 282, St. Anthony-New Brighton, Minnesota ("Employer" or "School District") are subject to a Collective Bargaining Agreement ("Contract"), Joint Exhibit 1, effective July 1, 2010 – June 30, 2012. The Union filed a formal

grievance on August 4, 2011, which the parties were unable to resolve, and the Union exercised its right to invoke arbitration. The parties duly selected the undersigned arbitrator from a list provided by the Bureau of Mediation Services.

On January 2, 2012 and thereafter, on February 13 and April 11, 2012, the Arbitrator convened a hearing in St. Anthony Village City Offices, St. Anthony Village, Minnesota. During the hearing, the Arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties agreed to file briefs simultaneously and the Arbitrator received the briefs by e-mail on May 11, 2012, whereupon the record closed.

ISSUES

1. Does the Arbitrator have jurisdiction over this dispute?
2. Was Michael Johnson discharged for just cause? If not, what should be the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE XV – Discipline

Section 1. Discipline for Just Cause: The School Board shall have the right to discipline employees for just cause.

Subd. 1. Disciplinary actions by the School Board shall include only the following:

1.1 Oral reprimand
1.2 Written reprimand
1.3 Suspension
1.4 Discharge

Subd. 2. Employees who are to be discharged shall be notified in writing of such action together with a statement of the reason(s) for the discharge, a copy of which shall be sent to the Union.

Section 2. Grievance Procedure: A written reprimand, suspension, or discharge of an employee may be processed through the procedures of Article XIII (GRIEVANCE PROCEDURE).

Section 3. Notice of Resignation: Employees resigning from employment shall give at least 14 calendar days written notice to the School Board of their intention to resign.

Section 4. Notice of Termination: The School Board shall be required to give employees at least 14 calendar days written notice of termination, except when discharged for cause.

ARTICLE XIII – Grievance Procedure

Section 1.Definition: A grievance shall be defined as a dispute concerning the interpretation of or the adherence to the terms and/or provisions of this Contract.

Section 2. Procedure: In the event of an alleged grievance the employee or employees involved shall discuss the matter with their immediate supervisor within 14 calendar days from the date the grievance occurred. If the grievance is not resolved within 5 calendar days following the discussion between the employee(s) involved and their immediate supervisor the grievance may be appealed in accordance with the following:

> *Step 1*. Within 10 calendar days following the employee immediate supervisor discussion the Union shall give written notice of an appeal to the Superintendent or designee. The Superintendent or designee and the Union Business Representative shall meet and attempt to resolve the grievance within 10 calendar days after the union appeal is received by the Superintendent.
>
> *Step 2*. If the grievance remains unresolved following the Superintendent-Union Business Representative meeting, the Union may appeal the grievance, within ten (10) calendar days, to arbitration as provided by the provisions of Section 3 by serving written notice to the Chairperson of the School Board.

Section 3. Arbitration: An alleged grievance appealed in accordance with Step 2 shall be submitted to arbitration in accordance with the P.E.L.R.A.

EMPLOYER POSITION

The Employer argues that the Grievance should be dismissed for two reasons: 1) that the Arbitrator has no jurisdiction, because the Grievant failed to discuss the alleged grievance with his immediate supervisor within 14 calendar days from the time the grievance arose as required by the Contract; and 2) that the District had just cause to discharge the Grievant because he intentionally and repeatedly took unauthorized time off from work and committed other acts of dishonesty and insubordination. The District claims that the Grievant sometimes provided no

reasons for his absences and sometimes lied about the reasons for his absences, that he ignored the Employer's reasonable directives to provide medical documentation of his absences, and failed to follow the proper process for requesting and documenting time off, even though he was well aware of it. The Employer argues that it gave the Grievant many chances to remediate his conduct and avoid termination of his employment. The Employer contends that beginning with his job application, and continuing throughout his employment, the Grievant disregarded the truth concerning various workplace matters and failed to follow his supervisors' directives. The Employer believes that its decision to discharge the Grievant was for just cause.

UNION POSITION

The Union claims that it followed the Grievance provisions of the Contract, but that the Employer failed in its obligations to provide due process to the Grievant. The Union especially noted procedural irregularities, focusing on the Employer's failure to provide a Loudermill hearing, an investigation, a Tennyson warning at the meeting to discuss his absences, and failure to apply progressive discipline before discharging the Grievant. The Union also claims, essentially, that the Employer violated due process when Kristen Hoheisel, the Superintendent's delegate, refused to meet with the Union Business Representative during processing of the Grievance. The Union also claimed that the Grievant's discharge was not because of unauthorized absences from work, insubordination, or material misrepresentations of fact including false statements on his employment application. Rather, the Union argues on the Grievant's behalf, that the Grievant was a very competent employee and that the discharge was due to the machinations of former School Superintendent Rod Thompson, at one time a friend of the Grievant, who had developed ill-will toward the Grievant in the aftermath of a series of inappropriate text messages that Superintendent Thompson had sent to the Grievant's wife.

BACKGROUND

The School District is located in St. Anthony, Minnesota and serves the small community of St. Anthony Village and a portion of New Brighton, Minnesota.[1] Approximately 1800 students attend the elementary, middle, and high school combined. [2] The School District has approximately 225 employees, the majority of which are members of five bargaining groups composed of teachers, principals, custodians, clerical workers and food service employees.[3]

Michael Johnson, the Grievant, was hired April 15, 2009 for a job described as "District Landscaping, Grounds and Recreational Field Maintenance Lead." The job involved managing the buildings and grounds, including tasks such as mowing the grass, plowing snow, maintaining and improving recreational fields, and landscaping. Initially, the Grievant reported to Troy Urdahl, Director of Facilities and Director of Athletics and Activities. After approximately one year of trying to oversee the Grievant's work, Mr. Urdahl concluded that they were having communications problems, and arranged for the Grievant to report to Joe Eichler instead. Mr. Eichler was an 18-year District employee who retired in November 2011. He was in charge of building and grounds and supervised 11 people in the custodial unit. Tr. at 134-135. He supervised the Grievant with Mr. Urdahl for about one year prior to the discharge. Tr. at 136.

The Director of Business Services, Kristen Hoheisel, was Urdahl's immediate supervisor. She was employed by the School District for nine years and her duties included responsibility for all finance and business related matters as well as human resources. (T.19)

[1] Transcript, hereafter "Tr." at 20.
[2] Id.
[3] Tr. at 21.

She reports directly to the District Superintendent and the elected members of the School Board. (Tr. at 19) At the time of the discharge, then Superintendent Rod Thompson had resigned, and Ms. Hoheisel was reporting directly to the School Board. (Tr. at 195)

After a meeting on August 1, 2011, which will be described below, Ms. Hoheisel recommended the Grievant's discharge. On August 31, 2011, the Grievant was discharged by a vote of the School Board at a regular School Board meeting. A letter dated August 31, 2011, entitled Notice of Intent to Discharge, was prepared on behalf of the School Board and sent to the Grievant and the Union. It cites the grounds for discharge as "unauthorized absence from work, insubordination, and material misrepresentations of fact, including but not limited to making a false statement on your employment application with regard to your criminal history."[4] The Grievant's entire period of employment with the School District was a little over two years.

ISSUE 1. Does the Arbitrator have jurisdiction over this dispute?

The School District, through its Board, discharged the Grievant from employment with the School District as of August 31, 2011. By the date of this discharge, however, the Union had already appealed to arbitration.[5] It had filed a grievance contesting the August 1, 2011, suspension without pay and the recommendation to discharge the Grievant, and it had been denied an opportunity to discuss the Grievance with the Superintendent's Delegate. The District had refused to meet, claiming the Union skipped a step in the grievance process, because the Grievant did not first discuss the Grievance with his supervisor. Therefore, the Employer argues that the Union's grievance is not arbitrable and should be dismissed for lack of jurisdiction.

[4] Joint Ex. 28, Notice of Intent to Discharge Michael Johnson, August 31, 2011.
[5] Joint Ex. 27, letter dated August 18, 2011, from Business Agent to School Board Chair.

Many arbitrators believe that when contract language is ambiguous or unclear, or there are uncertainties about time limits, the dispute should be resolved against forfeiting a grievance.[6] I agree with that rationale and decline to dismiss this matter on jurisdictional grounds. To reach this conclusion I have considered these procedural facts:

1. On August 1, 2011, Kristen Hoheisel, the Commissioner's designee; Troy Urdahl, the Grievant's official supervisor; Todd McDonough, the Grievant's Union Steward; and the Grievant met to discuss the Grievant's unauthorized absences from work in July. At the meeting, Ms. Hoheisel insisted on specific details about the absences.

2. After 15-20 minutes the Grievant became upset, stood up, and left the meeting, saying something to the effect of, "I know you want to fire me. So do it."

3. After the meeting on August 1, 2011, Ms. Hoheisel wrote a letter to the Grievant telling him that he was suspended without pay effective immediately and that she was recommending his discharge to the School Board, which would act at its regularly scheduled meeting on August 31.

4. On August 4, 2011, the Union filed a Grievance stating that the Grievant had been unjustly suspended, and the District "wrongly intends to discipline twice for the same offense. District did not provide statement of reason(s) for 'pending' discharge." The Union cites an Employer violation of Article XV, Discipline.[7]

5. On August 15, Ms. Hoheisel sent the Grievant and the Union a written letter stating reasons for suspensions and discharge.[8]

6. On August 15, Ms. Hoheisel sent the Union Business Agent, Russ Lewis, a letter canceling a previously scheduled meeting to discuss the Grievance, stating, "…a meeting at this time is not warranted, because the grievance does not comply with the procedural requirements of the collective bargaining agreement. Specifically Mr. Johnson did not discuss the matter with his immediate supervisor, Troy Urdahl, within fourteen (14) calendars of the date of the alleged grievance…"[9]

[6] Elkouri and Elkouri, *How Arbitration Works*, Sixth Edition, (BNA 2003) at 221, Citations omitted.
[7] Joint Exhibit 23.
[8] Union Ex. 4, letter from Ms. Hoheisel to the Grievant, August 15, 2011.
[9] Joint Exhibit 25, letter to Mr. Lewis from Ms. Hoheisel, August 15, 2011.

7. On August 31, 2011 the School Board voted to discharge the Grievant, and the School Board Clerk wrote a letter to the grievant entitled Notice of Intent to Discharge.[10]

The Employer's argument that the arbitrator lacks jurisdiction is not predicated on a failure to timely file the grievance, but on the employee's failure to meet and discuss his grievance with his supervisor, a step described in Article XIII, Section 2. I find Section 2 unclear and ambiguous. Based on the facts, it is subject to more than one interpretation. First, the Union appears to interpret the language to mean that Step 1 is the point at which the Union should begin the grievance process, a reasonable assumption based on terminology alone. (The steps should be numbered differently if the section called "Step one" is really Step two.) A grievance should not be denied for the sole reason that the Union did not begin with a step buried in a section preliminary to "Step 1."

But more important, it is also reasonable for the Union to assume that it should begin with "Step 1" based on the substance of what occurred at the meeting on August 1. (See facts above.) The Grievant had every opportunity to explain his side of the story to his supervisor, Troy Urdahl, who attended the meeting. Instead, the Grievant chose to leave, advising Ms. Hoheisel to fire him. The purpose of language providing for an initial meeting between a grievant and his supervisor is to allow each to hear the other's side of the story and try to resolve the dispute immediately. Here, the supervisor and the grievant were at the August 1, meeting, the Grievant left the meeting, and he essentially waived his right to further explain his side of the story. After this, it was reasonable for the Union to proceed to the next step. Failure to attempt a second meeting with the supervisor within 14 days of filing the Grievance is not a jurisdictional defect under these circumstances. The Union in good faith attempted to follow

[10] Joint Exhibit 28.

the grievance process in the contract, starting at step one within 14 days of filing its grievance by attempting to meet with the Superintendent's designee, Kristin Hoheisel. The fact that she scheduled, and then canceled a meeting as set out in paragraph 7 above, removed any possibility of informal efforts to resolve this dispute. Where the grievance is timely; the contract language ambiguous; and where the Grievant actually had an opportunity to explain his story to his supervisor, but waived that right by storming off, the defect is *de minimis* and not a bar to arbitration.

ISSUE 2 – Was the Grievant discharged for just cause?

FACTS

In early 2009, then School Superintendent, Rod Thompson, a personal friend of the Grievant and his wife, encouraged him to apply for a School District job described as "District Landscaping, Grounds and Recreational Field Maintenance Lead." Mr. Johnson had experience in construction, landscaping and other activities relating to grounds keeping, and Mr. Thompson told him this would be a great fit for his skills.[11] At the time, the District was about to begin some major construction and landscaping for a recreational sports field project (hereafter, "Project").

1. Job application

The Grievant applied for the job by submitting an on-line job application form and meeting with the Superintendent. According to the job application, the Grievant had graduated from high school, was currently self-employed in a construction/landscaping business, had been honorably discharged from the armed services, and had never been "arrested, charged or convicted of a criminal offense other than a minor traffic violation." (Tr. at 26-7.) The School

[11] Tr. 228.

District later discovered that some of this information was not true. The false representations about his criminal history were discovered after a criminal background check in September 2010, after he had worked for the Employer about a year and a half. The background check revealed that the Grievant had three criminal convictions, one for theft, one for loitering, and one for the issuance of a bad check; he also had a probation violation on his record. (Jt. Ex. 4; Tr. at 30-33). He explained the false representation concerning his criminal history by stating that his wife had filled out the on-line application form and that she was not aware of his history when she did so. (Tr. at 242)

Another statement in the Grievant's application for employment, that he was an honorably discharged veteran, was also inaccurate. Had he established that he had been honorably discharged, the School District would have paid his salary during the administrative leave leading to discharge, and perhaps beyond, pursuant to the Veterans Preference Act, Minn. Stat. § 197.47 *et. seq*. Yet, he did not provide evidence of honorable discharge to the Employer. (Testimony, Kristen Hoheisel, Tr. at 35.) At the hearing, the Grievant produced a military form designating his discharge as "Entry Level Separation (uncharacterized)." A discharge that is "uncharacterized" means that it is not characterized as honorable, dishonorable, or anything else. According to Union Exhibit 6, the Grievant was in the armed services for less than a month because of an "erroneous enlistment". The Re-enlistment Code "RE-3E" on the form means "failure to meet education prerequisite."[12] Nonetheless, the Grievant testified that he left the military because he had an injury and "had to be flown back immediately to be taken care of." (Testimony, M. Johnson, Tr. at 278-80.)

[12] Source: About.com: US Military, "About.com" is a part of the New York Times Company.

2. Boiler's license.

The School District hired Mr. Johnson on April 15, 2009, without making a thorough background check.[13] It hired him at a salary rate that included pay based on having a license as a Special Class Engineer ("boiler's license"), but he did not have such a license. Beginning with his 90-day performance review in August 2009, he was given a deadline by which that license must be obtained. (Joint Exhibit 5.) He did not obtain the license, despite efforts made by Joe Eichler, at that time his supervisor, to help him prepare. (Tr. at 141) On January 28, 2011, the Grievant was told that he had to obtain his boiler's license by April 15, 2011, or his wages would be reduced to reflect the lack of licensure. (Jt. Ex. 9). The Grievant's hourly pay was reduced, effective April 16, 2011. (Jt. Ex. 29). Eventually, on April 19, 2011, he did take the license exam, but failed it. (Union Exhibit 7.) Nonetheless, he told others that he did have it. (Tr. at 127.)

3. Hours of Work.

School District witnesses described the Grievant's failure to follow School District rules regarding hours of work as the precipitating factor leading to the discharge. The Grievant had a longstanding pattern of failing to follow the regular workday schedule and failing to follow School District rules concerning requests for time off. School District Ex. 3 contains 46 pages of copies of leave requests, many pages containing two requests per page, dated June 30, 2010 to July 2011. These requests were often made after the fact, and some were not accurate. The Grievant was warned about working his scheduled hours from the first formal review of his work performance, conducted 90 days after hire by Mr. Urdahl and Ms. Hoheisel. He was reminded in writing that when he did not work his scheduled hours, he was required to fill out a

[13] Tr. at 25-26.

leave request form ("pink slip") and obtain preapproval for any overtime or time away from work. (Tr. at 44-45.) The Employer recorded a number of instances where the Grievant submitted leave slips after the fact. There were numerous oral discussions about regular hours of work and about proper procedures for requesting sick leave and use of compensatory time before absenting himself from the workplace. For example, around Easter break 2010, when Joe Eichler was supervising the Grievant, Mr. Eichler became frustrated and upset because he was not getting forms filled out in advance for the time the Grievant had been taking off from work. He called a meeting with the Grievant and the Union steward and told the Grievant in no uncertain terms that the slips had to be given to him in a timely fashion, because Mr. Urdahl and Ms. Hoheisel were serious about getting these problems straightened out, and they were holding him (Mr. Eichler) responsible. Mr. Eichler did not want to "chase him down" for the slips any more. (Tr. at 147-50.) It may have been that at some time previously the District had been less interested in keeping track of employees' hours formally, but that was no longer the case. Following this meeting, Mr. Eichler believed that the Grievant knew exactly what was expected of him.

Several months later, on August 3, 2010, Ms. Hoheisel issued a written reprimand to the Grievant for not complying with the work hour schedule. She advised him in writing that flexible scheduling was not permitted without prior authorization and compensatory time needed prior approval to be granted. The Union did not grieve this reprimand.

Ms. Hoheisel began personally taking note of the Grievant's attendance at work, and she noticed a pattern where the Grievant was regularly absent on Tuesdays and claimed he was ill. (Tr. at 59) Because Ms. Hoheisel was aware that the Grievant played in a golf league on

Tuesdays, she told the Grievant, in writing, on May 19, 2011, that any absences from work on Tuesdays would require a doctor's note. (Jt. Ex. 10, Tr. at 58-9)

Notwithstanding all of the discussions and directives, during the month of July 2011, the Grievant did not follow the proper procedures for reporting time off from work:

1. On Tuesday July 12, 2011, the Grievant told Ms. Hoheisel that he was injured, had gone to the doctor and had been placed on weight lifting restrictions through Friday July 15, 2011 (Jt. Ex. 12; Tr. at 63.) She expected his return to work on Monday, July 18.

2. Grievant did not return to work on July 18, nor did he contact anyone about it. (Tr. 68)

3. On Tuesday, July 19, 2011, the Grievant sent an email message to Mr. Urdahl and Mr. Eichler that his lifting restrictions had been continued. (Jt. Ex. 15). They notified Ms. Hoheisel who requested another doctor's note documenting continued restriction. The Grievant said he would produce such a note, but he did not.

4. On Wednesday, July 20, when he still had not returned to work, Ms. Hoheisel contacted the doctor herself. The doctor's office told her that the Grievant was still on restrictions, but because the Grievant said he was still working it was impossible to abide by the lifting restrictions. (Tr. at 65, 73.) The Grievant was not working for the District at that time.

5. On Thursday, July 21, the Grievant still had not returned to work or provided medical documentation. After further requests that day, a doctor's note was faxed to the District at 9:00 p.m.

6. On Friday July 22, the Grievant told Mr. Eichler that he had an appointment to see his doctor on Monday July 25, and agreed to bring in another note from his doctor.

7. On Monday July 25,the Grievant did not return to work, he did not contact anyone to explain, and did not bring in medical documentation.

8. Also on July 25, Ms. Hoheisel contacted the doctor's office and learned that the Grievant had seen his doctor that morning and all work restrictions had been removed.

9. On Tuesday, July 26, an hour an a half after the start of Grievant's shift, the Grievant sent an email to Mr. Urdahl and Mr. Eichler that stated, "Guys, I'll be returning to work on Wednesday…and I will bring the return to work [doctor's note]…" (Joint Ex. 17.) He offered no explanation about not being at work on Tuesday.

10. On Wednesday July 27, the Grievant did not return to work. He sent an email to Eichler and Urdahl saying his shoulder was "still an issue," that he had a 9:00 a.m. doctor's appointment and would fax medical documentation. He did not.

11. On July 28, the Grievant did not come to work or contact anyone at the District to explain his absence. Ms. Hoheisel asked Mr. Urdahl to contact the Grievant and set up a meeting for Monday, August 1. Urdahl told the Grievant that they needed to meet to discuss his absences from work.

In summary, the Grievant was absent from work for nearly three weeks during the month of July. Part of that time he was allegedly unable to work because of a shoulder injury. Periodically, he did not come to work when he said he would, and did not provide doctors notes when he said he would. The meeting on August 1 was to give him an opportunity to explain, but when confronted with the specific facts, he left the meeting in anger. See page 7 above, paragraphs 1-4 regarding the meeting.

DISCUSSION AND DECISION, ISSUE TWO

The School District may only discharge an employee for just cause under Article XV of the Contract. The "just cause" concept allows an employee's termination in several types of situations: either a single incident of very serious misconduct, the final step in the progressive discipline process, or in cases sometimes called "last-straw" discharges. [14]

This case most closely resembles a "last-straw" case, as described in *Discipline and Discharge in Arbitration*, ed. Norman Brand, ABA Section of Labor and Employment Law, (BNA, 1999):

> In cases commonly referred to as "last-straw" discharges, an employee engages in some misconduct that would not, by itself, be just cause for discharge. However, based on the accumulation of offenses, the employer decides termination is appropriate. This decision reflects the employer's conclusion that past efforts at rehabilitation have failed and there is no reasonable alternative to discharge. Arbitrators will uphold last-straw

[14] See, Discipline and Discharge in Arbitration, Norman Brand, ed., ABA Section of Labor and Employment Law, BNA, 1999, at 68 and 70. Citations omitted.

> discharges when the employer has sufficient evidence to show that an employee's pattern of unsatisfactory conduct warrants discharge.

(Citations omitted) (*id.* at 70.)

The District established that it made a considerable effort to change the Grievant dysfunctional workplace conduct to no avail, and the Grievant's multiple unauthorized and unexplained absences in July were strikingly contrary to the District's rules. Although Mr. Eichler and Mr. Urdahl admitted that at some time in the earlier part of the Grievant's employment he had worked a great many overtime hours and the District may not have kept complete formal records of the compensatory time earned and used by the Grievant and other employees[15], that was past history, and since at least spring of 2010, the Grievant knew he was now required to work regularly scheduled hours and fill out pink slips for time off in the stipulated way. The Grievant was either unable or unwilling to do so, despite Troy Urdahl, Joe Eichler, and Kristen Hoheisel's efforts to impress upon him the necessity of following these workplace rules.

The Grievant's attendance problems were compounded by the fact that his coworkers could not rely upon his statements to be true. In addition to the July series of misrepresentations about when he was seeing a doctor, when he was actually unable to lift more than 5 pounds, and when he was coming to work, the District presented evidence of at least three other situations where the Grievant's word could not be relied upon. First, the District found statements the Grievant made on his job application to be untrue. Second, the District issued a written reprimand on October 26, 2009, regarding another untrue statement. The incident that was the basis for this disciplinary action was the Grievant's unauthorized use of the District's pick-up

[15] The Grievant stated that at one time overtime and compensatory time records were kept on a calendar that was thrown away by another employee at some point.

truck, seen on October 25, a weekend day, at a site where the Grievant's private construction company was building a house. On Monday October 26, 2009, Ms. Hoheisel asked the Grievant why he had been using the District truck, and the Grievant falsely stated that he had permission to use it, but he did not. She documented the incident in a letter to the Grievant dated October 26, 2009 (Jt. Ex. 6.) No grievance was filed concerning this reprimand, so it is taken as true.

Third, the District established that other employees were affected by their inability to rely on the Grievant's word. The Grievant caused the payroll technician a great deal of unnecessary frustration and time trying to make sense of the confusing trail of pink slips that the Grievant filed in an untimely manner, submitting more than one explanation for his work hours on a given date. (Tr. at 182 *et. seq.)* With another coworker, Jon Hummel, who worked under his direction for a time, the Grievant took the position that he had passed the boilers license test even though he had not. Mr. Hummel, who appeared by subpoena, also recalled a time that he and the Grievant participated in a golf tournament for the Minnesota Sports Turf Managers Association and Mr. Hummel had to use vacation time for that activity. He was at the time a social friend of the Grievant, and Mr. Hummel believed that the Grievant did not use his vacation time for the outing to Iowa. According to Mr. Hummel, the Grievant was playing golf while "out of work due to a lifting restriction that was placed on him due to an injury he had." (Tr. at 128-29) These statements were not contradicted by the Grievant. Also, the Grievant's job performance review for 2010-2011 indicates that at least one coworker complained that the Grievant was able to use "bizarre" reasons for missing work which were not available to them. (Joint Ex. 9, 360-degree performance review.) (*See, also,* testimony of Eichler, Tr. at 151-152.) Each of these incidents may have been a small matter standing alone, and the District did not discipline the grievant for them, but they are additional evidence of a pattern of unsatisfactory

conduct that the employer was unable to correct. In almost any job it is important for an employee to be reliably truthful.

The Union raises questions of due process. It is axiomatic that just cause for discharge requires that the employee be aware of the charges against him and he be given an opportunity to explain them. When the Grievant was asked to attend the meeting of August 1 to explain the discrepancies in his story about why he did not work during the month of July, Troy Urdahl advised him in advance that the meeting was to discuss the July absences, and that he would be given him an opportunity to explain them. The Union steward who attended the meeting, Todd McDonough, also knew the purpose of the meeting in advance. The Grievant understood that the meeting was about possible discipline; in fact, he understood that he might be discharged. He left the meeting in anger after 15-20 minutes saying something to the effect of, "I know you want to fire me. So do it." Not only does this statement acknowledge that he understood the situation, it also can be considered a waiver of the right to discuss the allegations further.[16]

The August 1 letter from Ms. Hoheisel to the Grievant does not give specific written reasons for recommending discharge.[17] Nonetheless, her very specific August 15 letter to the Grievant with a copy to the Union cures this defect. [18] At this point, the Grievant had not yet been discharged because the School Board had not yet acted on Ms. Hoheisel's recommendation. He was not discharged until the Board acted on August 31. [19] Neither the Grievant nor his representative argued the case at the Board meeting, and there is no evidence that he made a request to the Board to appear. This opportunity to argue his case appears to

[16] As to the lack of a Tennyson warning, the Union did not explain what, if any, private data was disclosed that required such a warning and how that would affect a just cause finding.
[17] Joint Exhibit 22, letter to the Grievant, August 1, 2011.
[18] Union Exhibit 4.
[19] The grievance from which this case arises was filed before the Grievant was discharged, and no grievance was filed after the actual discharge, August 31, 2011.

have been waived. The Union also had this arbitration hearing as an opportunity to present the facts, so that any misunderstandings concerning the Grievant's alleged unauthorized absences from work and ability to follow the rules could be addressed.

The Union claims that the Employer violated the Grievant's right to due process because he was not afforded a *Loudermill* hearing. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985) the Supreme Court held that a hearing to afford an initial check against a mistaken decision was necessary prior to the termination of a public employee. This occasion need not be a full fledged hearing with an opportunity to call witnesses and cross examine them, but must meet some minimum standards. It must be shown that the employee was given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. The District provided the minimum requirements to satisfy the Grievant's Constitutional right to procedural due process. Just as the Eighth Circuit Court of Appeals concluded in *Coleman v. Reed*, 147 F3d 751, 754 (8th Cir. 1998), an opportunity for a meeting with the District Administrator, an opportunity for a meeting with the School Board, and this arbitration hearing were sufficient to meet the requirements of due process when a school district employee is discharged, given that the employee understands the charges against him. There was no mystery about the reasons for discharge in this case.

The Grievant and the Union argued repeatedly at the hearing that ex-school superintendent Rod Thompson's personal falling out with the Grievant was the reason for the discharge. The Grievant and his wife, Josephine Johnson, testified that Mr. Thompson had sent her sexual text messages.[20] They believed that Mr. Thompson did not want the School District

[20] I ruled that the text messages were not relevant.

or the community to find out about this, and therefore, Mr. Thompson somehow caused the Grievant's discharge to occur. (Tr. at 229) Superintendent Thompson had resigned before the July incidents giving rise to this grievance, and regardless of his personal view, the District established by a preponderance of the evidence that the Grievant's pattern of misconduct justified discharge.

The Union argues that progressive discipline was lacking, and discharge is too serious a remedy for the conduct in question. The District established that the Grievant had been warned repeatedly for over a year about the importance of documenting his absences from work in accordance with the Contract and the employer's rules. The Grievant's supervisor, Troy Urdahl, felt unable to correct problems he had with the Grievant and reassigned supervision to Joe Eichler. Eventually, Mr. Eichler, too, became frustrated with his inability to get the Grievant's attention to the rules of the workplace about regular work hours and procedures for obtaining authorized leaves. Testimony evidenced many discussions with the Grievant on these subjects. Union Steward Todd McDonough testified there were numerous times when Mr. Eichler would talk to him about how upset he was that the Grievant was not filling out the pink slips for time off. (Tr. at 327) The Grievant did not deny that Mr. Eichler repeatedly directed him to follow the rules about hours of work and absences. Nor did the Grievant deny that he understood what the rules were. He was able to recite them at the hearing. The District issued two clear written reprimands to him prior to the August 1 meeting. In addition, on May 19, Ms. Hoheisel wrote him a memo specifically requiring a doctor's note if he should be absent from work and request sick leave. Yet, during the month of July, the Grievant did not provide doctor's notes upon request, told the employer he was seeing the doctor on different days than he actually did, and did not come to work on the days when he said he was coming. During that stretch of time there

were days when he did not come to work and no one heard from him at all. This is unacceptable conduct in any work place, and is the last in a series of incidents involving unauthorized absences from work, and dishonesty about various matters. On these facts, further efforts to rehabilitate the Grievant by issuing suspensions would be fruitless. Not only did the Grievant acquiesce in his own discharge by daring Ms. Hoheisel to fire him, but also, both of the union members who testified at the hearing agreed that the Grievant had plenty of warning. Mr. McDonough stated that he was not the only Union member who felt "that the District gave [the Grievant] so many chances it was unreal." (Tr. at 328) Evidence established just cause for discharge.

AWARD

The Grievance is denied.

Dated: June 7, 2012

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Andrea Mitau Kircher
Arbitrator